

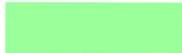


U.S. Citizenship
and Immigration
Services

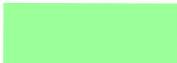
(b)(6)



DATE: JAN 07 2013 Office: BALTIMORE, MD

FILE: 

IN RE:

Applicant: 

APPLICATION:

Application for Waiver of Grounds of Inadmissibility pursuant to section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

A handwritten signature in black ink that reads "Michael Shumway".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Baltimore Field Office in Baltimore, Maryland and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Nepal who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a controlled substance violation. The applicant is the spouse and parent of a United States citizen and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in conjunction with an adjustment of status application, to obtain admission to the United States as a lawful permanent resident.

In a decision dated November 19, 2009, the director found that the applicant had not shown statutorily eligibility for the waiver application, where he had not demonstrated that his controlled substance conviction involved less than 30 grams of marijuana. The director further found that the applicant had failed to establish extreme hardship to the qualifying relative, as required under section 212(h) of the Act, and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly.

On appeal, the applicant¹ contends that he is statutorily eligible for the waiver as his controlled substance conviction involved less than 30 grams of marijuana. He further asserts that his wife and minor son would face extreme hardship should his waiver application be denied.

The record of evidence includes, but is not limited to the applicant's statement; the applicant's wife's statements; the birth certificates of the applicant's wife and son; college registration records for the applicant's wife; 2008 tax records; the applicant's passport; and the applicant's criminal records. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

¹ The applicant signed and filed the Form I-290B, Notice of Appeal or Motion, dated December 18, 2009. Subsequently, a second Form I-290B, dated December 28, 2009, was filed and signed by counsel, requesting reconsideration by the United States Citizenship and Immigration Services (USCIS) of the denial of the applicant's Form I-485, Application to Register Permanent Residence of Adjust Status. The second I-290B included an executed Form G-28, Notice of Entry of Appearance as Attorney or Representative, as required by regulation and as set forth in the instructions to the Form I-290B. 8 C.F.R. § 292.4(a). However, the record does not contain proof of counsel's authority to appear as an attorney or authorized representative, and the AAO was unable to confirm such authority. As such, the applicant will be deemed self-represented, as he signed and filed the Form I-290B and subsequently filed a statement, dated January 15, 2010, with additional supporting evidence without assistance of counsel. Accordingly, the decision of the AAO will be furnished directly to the applicant.

The record reflects that the applicant entered the United States on or about August 25, 2003 on a F-1 nonimmigrant student visa. He thereafter fell out of status and remained in the United States without authorization. The record discloses that the applicant was arrested on two occasions in Indiana. On September 24, 2003, the applicant was charged with possession of marijuana and possession of paraphernalia. On September 25, 2003, he pled guilty to possession of marijuana in violation of section 35-48-4-11 of the Indiana Code (IC), a class A misdemeanor, and was sentenced to one year conditional discharge. The remaining charge was dismissed. On March 13, 2004, the applicant was charged with possession of marijuana, visiting a common nuisance, and possession of paraphernalia. The charges were later dismissed without prejudice.

Based on the applicant's single marijuana possession conviction, the director found him inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act, for having been convicted of a controlled substance violation. As the applicant has not disputed inadmissibility on appeal, and the record does not show the finding to be in error, the AAO will not disturb the determination of inadmissibility under section 212(a)(2)(A)(i)(II) of the Act.

Section 212(h) of the Act states, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if –

(1)

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien

The plain language of section 212(h) makes a waiver under that section available to applicants who are inadmissible under section 212(a)(2)(A)(i)(II) of the Act only if the controlled substance conviction relates to a single offense of simple possession of 30 grams or less of marijuana. The statute at issue here, I.C. § 35-48-4-11, provides that a conviction under that statute is a class D felony (i) if the amount involved is more than thirty grams of marijuana or two grams of hash oil or hashish, or (ii) if the person has a prior conviction for an offense involving marijuana, hashish, or hash oil. Otherwise, a conviction for an offense under that statute is a class A misdemeanor. The AAO observes that the certified conviction record indicates that the applicant's marijuana conviction under I.C. § 35-48-4-11 was classified as a class A misdemeanor, indicating that the applicant's offense was found not to have involved more than 30 grams of marijuana.² Thus, the applicant is eligible for a waiver under section

² The applicant on appeal has also provided a letter, dated October 13, 2009, from the North Manchester Police Department in Indiana, to corroborate his claim that his marijuana conviction involved less than 30 grams of marijuana. However, we do not rely on the letter as its references to the applicant's two arrests are somewhat inconsistent with the information found in certified criminal records. For instance, the letter suggests that the applicant was only arrested for a town ordinance violation regarding Noise on September 23, 2003, while the conviction record indicates he was charged and convicted on that occasion

212(h) of the Act. The applicant's qualifying relative for purposes of a waiver under section 212(h) of the Act to overcome this ground of inadmissibility is his U.S. citizen spouse and minor son.

Section 212(h) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (Board) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565. The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. See, e.g., *Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. See *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); but see *Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The applicant contends that his U.S. citizen wife would suffer extreme hardship if she were separated from the applicant. The applicant's wife, in her letter of January 15, 2009, asserts that she would be financially burdened by such a separation, because her husband is the primary provider in the family. She indicates that she is a twenty-one-year-old (now twenty-three-year old) college student pursuing a nursing degree with a two-year-old son (now five years old). The applicant's wife states that, between taking care of the couple's son during the day and her evening college courses, she is unable to maintain steady employment or make sufficient income to support herself and her family without her husband's financial assistance. The record contains copies of the couple's joint Internal Revenue Service (IRS) tax returns and their IRS Form W-2 Wage and Tax Statements for 2008, showing that the applicant's wife's annual gross income for that year was a little over \$5,000. The applicant's wife attached to her statement, a list of the couple's monthly expenses, including rent, electricity, school, car expenses, and her son's expenses, amounting to over \$3,000 per month. She asserts that without her husband, she would not be able to provide the bare necessities for her son's care. She maintains that her own family is unable to assist her financially. Although applicant's wife has not included any statements or letters from her parents, she states that her parents, who were divorced when she was a child, have since remarried and have started separate families. Thus, they are not in a position to provide her with financial assistance. The applicant's wife also refers to the poor socio-economic situation in Nepal and the difficulty of finding employment there, following a decade long civil war. The record indicates that it is unlikely that the applicant would be able to provide financial support for his wife and son in the United States, should he return to Nepal.

The applicant's wife also contends that she would face emotional and psychological hardship upon separation. She states that the applicant is the love of her life and supports her both financially and spiritually. She contends that the applicant has helped her to be a better mother and better human being. The applicant's wife also states that separation from her husband would mean that she would be forced to raise her son essentially without a father or mother, because she would have to leave her son daily to work and support him financially. She contends that she is afraid also that the separation from his father would be emotional torture for her son.

Having reviewed the preceding evidence, the AAO finds it to establish that the applicant's spouse will experience extreme hardship upon separation from the applicant. In reaching this conclusion,

we note the applicant's spouse's financial and emotional reliance on the applicant and the emotional, psychological, and financial hardships she would face raising a young son as a young, single mother without the assistance of her husband. Documentary evidence corroborates the applicant's spouse's claims of emotional hardship and financial concerns. The AAO concludes that, considering the evidence in the aggregate, the hardship to the applicant's spouse upon separation rises to the level of extreme hardship.

The AAO must also determine whether the record demonstrates that the applicant's spouse would experience extreme hardship if she were to relocate to Nepal. The applicant's spouse states that she has considered moving to Nepal with the applicant, but asserts that the situation there is one of the worst in the world. She contends that Nepal is a third world country still recovering from a decade long civil war with the Maoists, which has resulted in a very poor economy. She asserts that employment is difficult to obtain in Nepal and that it would be hard to support her son there. The applicant's wife also notes that she would be unable to complete her nursing studies in Nepal. Although the record does not contain background evidence on country conditions in Nepal, the AAO takes administrative notice of the most recent Background Note issued by the U.S. Department of State (DOS), which reports that Nepal ranks among the poorest nations in the world with an estimated 25% of the population living below the poverty line in 2008. See Bureau of Consular Affairs, U.S. Dep't of State, *Background Note: Nepal* (March 5, 2012).

The applicant's spouse also expresses concern about the quality of education that would be available in Nepal for the couple's son. She further asserts that the average lifestyle in Nepal is well below acceptable standards in the United States, and states that she cannot see how she would sustain herself in a third world country, particularly given that she is unfamiliar with the country's language and culture. We also note that the record demonstrates that the applicant's wife has resided in the United States her entire life and has well-established ties here.

Having considered the evidence of record, the AAO finds that, when considering the various hardship factors, in the aggregate, including: the applicant's spouse's relative young age; her birth and long-term residence in the United States; her unfamiliarity with the language and culture of Nepal; the presence of all her extended family members in the United States; the lack of any family or social ties in Nepal, outside of the applicant; the loss of educational and employment opportunities in the United States; the extremely poor socio-economic conditions in Nepal; the difficulties of raising a young child in the United States without the applicant or with the applicant in Nepal; and the disruptions and difficulties normally created by relocation, the applicant has met his burden in demonstrating that the his wife would face extreme hardship if she relocated to Nepal. The applicant has established statutory eligibility for a waiver of his inadmissibility under section 212(a)(2)(A)(i)(II) of the Act.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Matter of Mendez-Moralez*, 21 I&N Dec. at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

In *Matter of Mendez-Moralez*, in evaluating whether relief is warranted in the exercise of discretion, the BIA stated that:

[T]he factors adverse to the applicant include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency and seriousness, and the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident of this country. . . . The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where the alien began his residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value and service to the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends, and responsible community representatives).

Id. at 301 (internal citations omitted). The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant must bring forward to establish a favorable exercise of administrative discretion is merited will depend in each case on the nature and circumstances of the ground of inadmissibility sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors in this matter are the extreme hardship the applicant's U.S. citizen spouse would face if the applicant were to reside in Nepal, his minor U.S. citizen son, the applicant's community ties in the United States, his employment while in the United States, and his financial and emotional support of his spouse and child. We also note that the applicant's conviction is almost ten years old and is his sole conviction. The applicant's wife asserts that the applicant is a mature and responsible person and has not had any further trouble with the law. The unfavorable factors in this matter are the applicant's misdemeanor conviction for possession of marijuana and his violation of U.S. immigration laws when he remained in the United States without authorization.

The criminal and immigration violations committed by the applicant are serious in nature and cannot be condoned. Nonetheless, the AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted. Insofar as we have found that the applicant has established extreme hardship to his spouse and that he warrants a discretionary grant of the waiver, we find no purpose would be served in addressing the hardship to the applicant's U.S. citizen minor son.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

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Page 8

ORDER: The appeal is sustained.